

## **Professionalism Commission Minutes, May 12, 2004**

Judge Battaglia opened the meeting at 4:00 PM and asked everyone to identify themselves. Absentees included: Deborah Potter, Daryl Walters, William Hudson, Cornelius Helfrich, Linda Ostovitz, Norman Smith, Benson Legg, Linda Lamone, Sally Adkins.

Judge Battaglia encouraged the subcommittees to utilize the interns as they work this summer. The minutes from the March 31, 2004 meeting were approved, subject to amendment made by Professor Dash that reflected the Court of Appeals defines the unauthorized practice of law.

Judge Battaglia stated that the purpose of the meeting was to allow the subcommittee chairs to explain scope and method of each subcommittee's work so that the Commission can define where it is going during the next few months.

Mr. Donald Braden, chair of the *Judge's Role in the Bar and in Communities Sub-committee*, reviewed the outline his sub-committee had prepared and commented that the review encompassed the Code of Conduct for U.S. Judges and federal cannons, which were narrow in scope. He explained that it was his committee's impression that judges' role in the communities included not only CLE and educational activities but also social events. The federal cannons do not address participation in social events.

Mr. Braden stated that the first task of the subcommittee was to determine what judges may do in the community. The next task would be for the committee to talk to leaders of the bar about how and where they would like to hear from judges. The third task would be to talk to the judges themselves in order to understand whether they have the time and resources to participate in the community more often.

The following suggestions were given to Mr. Braden:

- Encourage involvement with the Inns of Court.
- The Judicial Ethics Committee is a good source of information about what judges can and cannot do. Liz Veronis is the staff person.
- More contact with law schools is needed.
- Find out what, if any, restrictions exist with respect to speaking engagements.
- Note that docket issues may arise if judges are expected to participate in the community during the day.
- In order to remind the public that judges and lawyers are, indeed, in the same profession, have judges and lawyers appear jointly.
- Note that there is some overlap with this sub-committee and the sub-committee

formulating guidelines and sanctions for use by judges.

Tom Lynch presented the work of the *Standards of professional conduct, including identifying indicia of professionalism* subcommittee, which has been nicknamed the “Character Counts” subcommittee. He noted that the subcommittee’s task was to implement the Professionalism Taskforce’s Recommendation Number 3 and identify what is “professionalism.” Mr. Lynch stated that the subcommittee’s plan involved three elements. First, the subcommittee planned to review the materials that had been created by other Maryland groups that had studied professionalism. For example, the subcommittee intends to consider the work of the MSBA, Montgomery County, Baltimore City, and the Young Lawyer’s Section of the MSBA. Second, the subcommittee intends to collate the results of its research of other groups in Maryland, identifying the common elements of their work. In addition, the subcommittee will look to other states’ work in the area of professionalism. Finally, Mr. Lynch sought guidance from the other commission members about further areas of research. Once all of the research is complete, the subcommittee intends to draft proposed guidelines by August to present to the Commission in September.

Mr. Lynch explained the significance of the “Character Counts” nickname. He stated that “Character Counts” is a national program that the business culture has used to improve professionalism. He said that the subcommittee thought that it might be useful to use that program to develop a similar model for professionalism for lawyers. If it is used, he believed that Maryland would break ground as the first state to apply the program to the legal profession.

Mr. Lynch stressed that the movement toward professionalism should not lose momentum gained by the work of the Commission. He suggested that, to maintain momentum, the Commission might consider requiring lawyers to reaffirm their commitment to professionalism periodically. Mr. Lynch related an experience in Frederick County, where local politicians signed declarations to maintain professionalism, and there was a marked improvement in civility.

The Commission members offered the following comments to the “Character Counts” subcommittee:

- One member disagreed with the notion that professionalism cannot be learned.
- Primary research, such as talking to juries, would be very interesting but could be a difficult task.
- The subcommittee might consider talking to judges who frequently talk to juries.
- Other studies of juries may be available for the subcommittee to use. An individual in Delaware, Lisa Blue, may have studied the topic.

- Some jurisdictions already use questionnaires to find out information from juries.
- Jury commissioners might also be useful sources of information.
- Primary research may be very time consuming and difficult. An entire commission could be designated to conduct such research, which may be beyond the scope of the subcommittee's work.
- Trial lawyers often become the focus of professionalism study, but the subcommittee should also make sure that the transactional practice of law is not excluded.

Dan Saunders reported on the work of the subcommittee assigned to study *Professionalism guidelines and sanctions for use by judges*. He perceives the subcommittee as specializing in litigation, and, ultimately, judges will be responsible for progress in this area. Lawyers tend to test the limits of professionalism, and the court must set consistent limits of behavior in the courtroom. Mr. Saunders hopes to raise awareness among judges that professionalism, in large part, depends on their commitment to the process. He is not clear whether the subcommittee should promulgate guidelines or contribute to the approach of the "Character Counts" subcommittee.

Mr. Saunders stated that the subcommittee should study judicial conduct and how that affects the overall perception of professionalism in the legal profession. The subcommittee will also consider attorney conduct both in and outside of court. In this regard, the subcommittee will study what remedies are currently available to combat unprofessional conduct and whether they are adequate. Mr. Saunders stated that the subcommittee would consider whether the current rules governing judges are adequate or whether they need to be expanded in order to force judges to issue sanctions. He mentioned that the subcommittee's most important task is to raise judicial awareness of attorney unprofessionalism.

Members of the Commission made the following comments regarding the subcommittee devoted to *Professionalism guidelines and sanctions for use by judges*:

- The subcommittee perhaps should consider the "alter-ego" program as a way of resolving disputes and taking action against unprofessionalism.
- Encourage judges to take attorneys into chambers to admonish them about unprofessional conduct.
- Many judges fear that issuing sanctions exposes them to complaints to the judicial disabilities commission.
- The subcommittee might consider amending the judicial canons to come up with specific rules for judges issuing sanctions.
- A middle ground may exist between action by Bar Counsel and an oral reprimand. Possibly, judges could write letters to the Court of Appeals describing a lawyer's unprofessional behavior. Sanctions may then be warranted if the lawyer has been the

subject of a series of such letters.

- The Commission, as appointed by the Court of Appeals, is empowered to change the rules about the nature of sanctions and when they can be issued.

Mr. Williams discussed the outline prepared by the *Discovery Abuse Sub-committee*. He noted that he believed that some primary research needed to be done. The sub-committee wants to explore dispute resolution, but does not want to reinvent the wheel and existing findings regarding dispute resolution of discovery issues. He also observed that, because a lot of discovery disputes don't get resolved, the sub-committee wants to explore the status of Discovery Masters in Maryland. Recommendations should improve, he explained, on what already exists. The sub-committee also wants to gather examples of efficient discovery resolution in Maryland.

Members of the Commission made the following comments:

- Montgomery County has a program where lawyers volunteer as discovery masters. The litigants pay their fees. This idea was well received by several members, although some pointed out that such a program might not work in small jurisdictions.
- Contact Judge Motz and Judge Legg about how they appoint special masters. It was noted that litigants often begin to cooperate when they have to pay special master fees.
- Remember to focus on run-of-the-mill disputes. Family law is an area with a lot of discovery disputes. Discovery demands are often used by the economically stronger party to coerce resolution. Family law may be a unique area that needs separate rules from other areas.
- In the non-family law context, it was observed that, if the size of the amount in dispute is relatively small, the worst discovery abuse often occurs because the abusing party knows that the other party will determine that it's not worth pursuing because paying for discovery will cost more than the amount of the claim.
- Although Discovery Masters are needed, the sub-committee was encouraged to consider the financial toll.
- Noted that Judge Kay Allison was handling discovery disputes in Baltimore City. Encouraged the sub-committee to talk to her.
- Noted that, in 1998, two judges were appointed to handle discovery disputes in the criminal context. It was also noted that sanctions are more direct in the criminal arena, which may explain why there is less abuse.

Karen Federman-Henry updated the commission on the study plans of the subcommittee for *Development of a professionalism course for lawyers who exhibit unprofessional behavior*. The subcommittee plans to research whether other jurisdictions have an approach for a

course of this nature. Before designing the course, however, the subcommittee would have to learn about the Commission's conclusions as to the indicia of professionalism. The subcommittee will also have to consider who has the power to send errant lawyers to the course and whether the bar even needs another mechanism for encouraging professionalism.

The following comments were made in relation to the subcommittee assigned to study a new course for unprofessional lawyers:

- Experienced lawyers that demonstrate unprofessional behavior have been required to attend the course on legal responsibility at the law school. The circumstances of that arrangement are not clear.
- The new professionalism course should not operate under the assumption that lawyers do not know how to behave. Some lawyers know how to behave professionally and, for whatever reason, choose not to.
- The subcommittee might consider whatever guidelines are used when an attorney is required to attend the law school professional responsibility course.
- Some lawyers behave unprofessionally because they get away with it and because that type of behavior works to their or their clients' strategic advantage.
- Has anyone conducted a study about why lawyers behave badly?
- In one state that has a course for "bad lawyers," the lawyers view the course as a punishment. It is not clear whether a program would work that required lawyers to attend a law school professionalism class.

The chairperson of the subcommittee for *Updating existing professionalism course for new admittees*, Debbie Potter, did not attend the meeting. A member stated that he would get in touch with her and find out about the work of that subcommittee.

Mike Preston reported on the work of the subcommittee for *Defining the unauthorized practice of law*. He stated that to define the unauthorized practice of law, the subcommittee must first define the authorized practice of law. The subcommittee plans to gather information that is available from local and national bar associations, such as the MSBA and the state of Washington. The subcommittee plans to focus not on disbarred lawyers practicing law, but on how other professions encroach on the practice of law. The subcommittee intends to gather by July 21 information about the definition of the unauthorized practice of law. By August 25, the subcommittee hopes to have gathered information from other jurisdictions about how to enforce the unauthorized practice of law. The subcommittee will then (date to be announced) provide a synthesis of its research.

Members made the following comments about the unauthorized practice of law:

- The current definitions of the unauthorized practice of law are vague and inadequate.
- Bar Counsel regularly litigates cases involving the unauthorized practice of law. There is a well developed body of law on this subject.

Judge Salmon, chair of the *Mentoring Sub-committee*, explained his sub-committee's outline and noted that his sub-committee had a productive telephone conference. He said that one of the tasks of the committee would be to determine whether it is practical for Maryland to have a statewide mentoring program. He also stated that the group would define the purposes of mentoring and ask what is being done for new and errant lawyers. He noted that there was some mentoring done at the law schools, but also wanted to investigate what was being done on the county bar association level as well as in neighboring states. He also said the sub-committee would explore who would mentor, what they would do, and if and how they should be trained. Judge Salmon was particularly interested in receiving feedback on whether mentoring would work for errant lawyers.

The following comments were made:

- The State Bar Association has a mentoring program, at least in name. There is a list of mentors.
- There is also a leadership academy, which has mentors. Find out who is in charge now. Someone suggested Tracy Skinner.
- Noted that Montgomery County and the Women's Bar Association has a mentoring program. Large law firms also have mentoring.
- With respect to errant lawyers, it was observed that any mentoring program should not seem like a punishment. Regarding the role of a mentor for errant lawyers, it was suggested that an analogy might be a probation officer.
- Noted that mentoring should be about more than fixing problems – it should take into account that lawyers change jobs much more often than they used to and people – women in particular – have issues relating to parenting.
- Remember that being a mentor may be an indicia of professionalism and should be encouraged as such.

Judge Battaglia thanked the Commission for their thoughtful responses and foresees a wonderful product coming out of the work this summer. She reminded the sub-committees to utilize the interns. She thanked everyone for coming and adjourned the meeting at 6:00 PM.